Equity Corporation Sdn Bhd v Thye Sun Quarry Sdn Bhd

HIGH COURT (TAIPING) — CIVIL SUIT NO 22–39 OF 1994
ZULKEFLI J
30 MAY 2002

Contract *— Lease — Breach — Lease agreement to lease out quarry to plaintiff — Counterclaim by defendant — Whether defendant committed breach of terms of lease agreement as to obtaining licence, permits, access road or registering lease — Whether plaintiff committed breach of the terms of agreement as to payment of rent and royalty and instalment payment for machinery, payment of quit rent, quarrying and removing rock materials without surveyor's report, etc*

Pursuant to a lease agreement, the plaintiff leased a quarry from the defendant for a period of seven years. Apart from having to pay rental, it was agreed that the plaintiff was to pay royalty on the extraction of rock material. It was also included in the lease agreement that the plaintiff was to purchase certain machinery from the defendant and that the payment for these machinery was to be made over a period of 36 months. It was in evidence that there was a valid quarry licence issued by the local authority for the year 1992. However, subsequently, the authorities refused to issue a quarry licence to the plaintiff for causing damage to the neighbourhood in 1997. The plaintiff paid the rental for the first three months but subsequently the plaintiff did not pay the rent or the royalty or the installments for the machinery. As such, the defendant sought to terminate the lease agreement by giving notice to that effect. The plaintiff filed these proceedings seeking specific performance of the lease agreement as well as damages on the grounds that the defendant had breached the terms of the lease agreement by: (i) failing to obtain the quarry licence and other permits for the year 1993; (ii) failing to make available an access road to the quarry; and (iii) failing to register the land in question in the name of the plaintiff. In view of the refusal by the authorities to renew the quarry licence, the plaintiff claimed that the purchase of the machinery should be rescinded and the defendant ordered to repurchase the machinery. The defendant, on the other hand, counterclaimed for vacant possession, return of all plant and equipment, payment of installments due and damages. The issue for the determination of the court was essentially whether it was the plaintiff or the defendant who was in breach of the lease agreement.

Held, dismissing the claim with costs and allowing the counterclaim with costs:

(1) Based on the evidence, there was no proof that the defendant did not cooperate in applying for the necessary licences from the authorities. There was no evidence to establish that the defendant ever refused to sign the application for renewal of the licence for

A the year 1993 or thereafter. There was also no basis for the allegation that the defendant company defaulted in cooperating with the plaintiff in obtaining the necessary permits. There was no evidence of any breach on the part of the defendant in respect of the requirement to apply for a permit under the Perak Quarry Rules 1992 since the said Rules were not in force at the time the B agreement was entered into (see pp 81I, 82F, 83E–F, 84C).

(2) During the period the defendant operated the quarry, there was no requirement for an environmental report to be obtained. The question of the environmental report arose only in 1995 because of the complaint from residents in the vicinity who felt the effect C of the blasting done by the plaintiff. Hence, the failure to obtain an environmental report cannot be attributed to the defendant (see p 84D–F).

(3) There was no temporary occupation licence but there was no objection by the government for the use of the land as access to the D quarry and this was known to the plaintiff. On the evidence adduced, the authorities never denied any access. What the authorities wanted was the alternative route to be used by broadening it. The authorities' licence had always been issued subject to conditions and if the authorities required as a condition an alternative route in place of the existing access road, the plaintiff E cannot blame the defendant for it (see pp 85E–F, 86F, 87A).

(4) In construing any contract, the reasonableness of the result of such construction is the predominant consideration. It is reasonable to read the lease agreement in such a way that the access road would only be available as long as it was allowed by F the authorities (see p 87B–D).

(5) The defendant was not liable to have the lease registered in the name of the plaintiff when the plaintiff was blatantly violating the essential terms of the lease agreement as to payment of rent, royalty and instalments (see p 88A–B).

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(6) For the plaintiff to obtain specific performance, which is an equitable relief, the plaintiff has to prove that it performed the essential terms of the lease agreement. The plaintiff had breached the terms of the lease agreement by (i) failing to pay the rent as and when due; (ii) failing to pay royalty; (iii) failing to make instalment H payments for the purchase of plant and machinery as stated in the lease agreement; (iv) failing to obtain the necessary surveyor's report; (v) breaching the covenant as to nuisance, etc; and (vi) failing to pay the quit rent on the demised land. These breaches were of such fundamental importance that the defendant was entitled to treat itself as being discharged from the obligation under I the lease agreement. Hence, the notice of termination given by the defendant was a valid notice and puts an end to the lease agreement as this notice was given pursuant thereto (see pp 88C, 93G–H).

[Bahasa Malaysia summary

Selaras dengan satu perjanjian pajakan, plaintif telah memajakkan sebuah kuari daripada defendan untuk satu tempoh selama tujuh tahun. Selain daripada kena membayar sewa, ia telah juga dipersetujui bahawa plaintif haruslah membayar royalti atas pengorekan bahan batu tersebut. Ia telah juga dimasukkan di dalam perjanjian pajakan tersebut bahawa plaintif sepatutnya membeli sebuah jentera yang tertentu daripada defendan dan bahawa pembayaran untuk jentera ini hendaklah dibuat dalam tempoh sepanjang 36 bulan. Keterangan menunjukkan bahawa terdapat lesen kuari yang sah yang telah dikeluarkan oleh pihak berkuasa tempatan bagi tahun 1992. Walau bagaimanapun, kemudiannya pihak-pihak berkuasa tersebut telah enggan untuk mengeluarkan satu lesen kuari kepada plaintif kerana menyebabkan kerosakan pada kejiranan tersebut dalam tahun 1997. Plaintif telah membayar sewa bagi tempoh selama tiga bulan yang pertama tetapi kemudiannya plaintif tidak membayar sewa tersebut atau royalti mahupun ansuran-ansuran untuk jentera tersebut. Oleh itu, defendan cuba untuk menamatkan perjanjian pajakan dengan memberikan notis berhubung dengannya. Plaintif memfailkan prosiding ini bagi mendapatkan perlaksanaan spesifik akan perjanjian pajakan tersebut dan juga ganti rugi atas alasan bahawa defendan telah mengingkari terma-terma perjanjian pajakan tersebut kerana: (i) gagal untuk mendapatkan lesen kuari dan permit-permit lain untuk tahun 1993; (ii) gagal untuk menyediakan jalan masuk ke kuari tersebut; dan (iii) gagal untuk mendaftarkan tanah yang dipersoalkan itu atas nama plaintif. Memandangkan keengganan oleh pihak-pihak berkuasa untuk memperbaharui semula lesen kuari tersebut, plaintif menuntut bahawa pembelian jentera tersebut haruslah dibatalkan dan defendan diperintahkan supaya membeli semula jentera itu. Defendan, sebaliknya, meuntut balas untuk milikan kosong, pengembalian kesemua peralatan dan loji, pembayaran ansuran-ansuran yang kena dibayar dan gantirugi. Isu untuk penentuan oleh mahkamah adalah secara pentingnya sama ada ianya merupakan plaintif atau defendan yang telah memungkiri perjanjian pajakan tersebut.

Diputuskan, menolak tuntutan dengan kos dan membenarkan tuntutan balas dengan kos:

(1) Berdasarkan keterangan, tidak terdapat sebarang bukti bahawa defendan tidak bekerjasama memohon lesen-lesn yang perlu daripada pihak-pihak berkuasa. Tidak terdapat keterangan untuk menetukan bahawa defendan pernah menolak untuk menandatangani permohonan untuk pembaharuan lesen bagi tahun 1993 atau selepas itu. Tidak juga terdapat sebarang asas bagi dakwaan bahawa syarikat defendan telah ingkar dalam bekerjasama dengan plaintif bagi mendapatkan permit-permit yang perlu. Tidak terdapat sebarang keterangan mengenai apa-apa keingkaran di pihak defendan berhubung dengan syarat untuk

memohon bagi mendapatkan permit di bawah Kaedah-Kaedah Kuari Perak 1992 oleh kerana Kaedah-Kaedah tersebut tidak berkuatkuasa pada waktu perjanjian itu dimasuki (lihat ms 81I, 82F, 83E–F, 84C).

(2) Ketika tempoh itu defendan telah mengendalikan kuari tersebut, tidak terdapat syarat untuk satu laporan persekitaran yang harus diperolehi. Persoalan laporan persekitaran hanya berbangkit pada tahun 1995 kerana aduan daripada penduduk-penduduk di dalam persekitaran tersebut yang merasakan kesan letupan yang dilakukan oleh plaintif. Oleh itu, kegagalan untuk mendapatkan satu laporan persekitaran tidak boleh dikaitkan dengan defendan (lihat ms 84D–F).

(3) Tidak terdapat lesen penghunian sementara tetapi tiada bantahan oleh kerajaan bagi penggunaan tanah tersebut sebagai akses/jalan masuk ke kuari tersebut dan ini diketahui oleh plaintif. Atas keterangan yang dikemukakan, pihak-pihak berkuasa tidak pernah menafikan sebarang akses. Apa yang pihak berkuasa hendakkan adalah supaya jalan alternatif digunakan dengan meluaskannya. Lesen pihak-pihak berkuasa selalunya dikeluarkan tertakluk kepada syarat dan jika pihak berkuasa memerlukan sebagai satu syarat sebuah jalan alternatif bagi menggantikan jalan masuk yang sedia ada, plaintif tidak boleh mempersalahkan defendan bagi perkara ini (lihat ms 85E–F, 86F, 87A).

(4) Dalam menafsirkan sebarang kontrak, kewajaran dari keputusan pembentukan sedemikian adalah pertimbangan yang utama. Adalah wajar untuk emmbaca perjanjian pajakan tersebut dengan cara yang menunjukkan bahawa jalan masuk tersebut akan hanya tersedia setakat mana yang ianya dibenarkan oleh pihak–pihak berkuasa (lihat ms 87B–D).

(5) Defendan tidak bertanggungan untuk mendaftarkan pajakan tersebut atas nama plaintif sedangkan plaintif jelas melanggari terma-terma penting perjanjian pajakan tersebut berhubung dengan pembayaran sewaan, royalti dan ansuran (lihat ms 88A–B).

(6) Untuk plaintif mendapatkan perlaksanaan spesifik, yang mana adalah merupakan relif yang saksama, plaintif haruslah membuktikan bahawa ianya telah melaksanakan terma-terma penting perjanjian pajakan tersebut. Plaintif telah memungkiri terma-terma perjanjian tersebut kerana: (i) gagal untuk membayar sewaan sepertimana dan apabila kena dibayar; (ii) gagal untuk membayar royalti; (iii) gagal untuk membuat pembayaran-pembayaran ansuran untuk pembelian loji dan jentera sepertimana yang dinyatakan di dalam perjanjian pajakan tersebut; (iv) gagal untuk mendapatkan laporan juru ukur yang perlu; (v) mengingkari waad berhubung dengan gangguan; dan lain-lain; dan (vi) gagal untuk membayar cukai tahunan ke atas tanah demis tersebut. Keingkaran ini adalah jelas amat penting bahawa defendan berhak untuk menganggarkan dirinya sebagai

dilepaskan daripada kewajipan di bawah perjanjian pajakan. Oleh itu, notis penamatan yang diberikan oleh defendan adalah notis sah dan menamatkan perjanjian pajakan tersebut kerana notis ini telah diberikan selaras dengannya (lihat ms 88C, 93G–H).]

Notes

For cases on breach, lease, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3218–3220.

Cases referred to

Antaios Compania Naviera SA v Solen Rederierna AB [1985] AC 191 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd)

Ismail bin Mohamad v Haji Yahya & Ors [1988] 2 MLJ 185 (refd)

Tito v Wadell (No 2) [1977] 2 WLR 496 (refd)

Legislation referred to

Contracts Act 1950 ss 21, 52, 57(1)(2)
National Land Code ss 93, 94, 95, 221
Sale of Goods Act 1957 s 20
Specific Relief Act s 23(b)

Walter Teo (*Winston Ng & Teoh*) for the plaintiff.
A Iruthaya Raj (*Raj Selva & Co*) for the defendant.

Zulkefli J: The plaintiff's original claim against the defendant is for specific performance of the terms in the lease agreement ('LA') entered into between the plaintiff and the defendant on 17 September 1992. From the reamended statement of claim the plaintiff also claimed for damages on the grounds that the defendant had breached the terms of the LA as follows:

(1) the defendant failed to obtain the quarry licence and other permits for the year 1993;

(2) the defendant failed to obtain access road to the quarry;

(3) the defendant failed to have the lands registered in the name of the plaintiff;

(4) in view of the cancellation or refusal by Majlis Perbandaran Taiping ('MPT') to renew the quarry licence, the purchase of the machinery under the first schedule of the LA from the defendant should be rescinded and the defendant ordered to repurchase them.

DEFENDANT'S CASE

The defendant company, in its defence, relied, inter alia, on the following grounds:

(1) plaintiff undertook to obtain the necessary licences and permits. The defendant signed the forms prepared by the plaintiff. Therefore, there was no breach;

(2) the plaintiff was in breach of the terms by failing to pay the rent and royalty. The instalment payments for the machinery were not made. This was the reason why the LA was not registered;

(3) access road was available when LA was executed. Subsequently, access was denied by MPT. Alternative road was available;

(4) there was no interruption in the quarry operation. The necessary survey reports were not obtained;

(5) plaintiff committed breach of the essential term of the LA by not paying quit rent;

(6) removal of rock material from the land by the plaintiff was made without surveyor's report;

(7) there were laches, acquiescence and estoppel which can be attributed to the plaintiff by its own conduct and action.

The defendant also counterclaims for vacant possession, return of all plants and equipment (which did not form part of the machinery sold to the plaintiff) and payment of the instalments of RM263,888.70 and damages.

Background and facts of the case

A brief background and the relevant facts of the case gathered from the evidence adduced are as follows:

The defendant company has been running a quarry for at least more than 20 years. The man behind the defendant company is SD1, Ong Hean Hooi, who is its founder. As he was in his 80's and was no longer physically fit to run the quarry, the defendant company negotiated with and entered into an agreement with the plaintiff to lease out the quarry ('demised land') for a period of seven years. The LA was produced in court as exh P6. For the year 1992, there was a licence issued by Majlis Perbandaran Taiping ('MPT'). This licence was valid until 31 December 1992. Under the LA, the plaintiff was liable to pay monthly rental for occupation of the demised land as well as royalty on the extraction of the rock materials at an agreed rate of RM2 per cubic yard solid. There were other terms and conditions to be performed by the parties. The rental and royalty were to be paid within the time stipulated in the LA. Under the LA, the plaintiff also purchased outright from the defendant the machinery as stated in the first schedule to the LA. The purchase price of the machinery is to be paid by instalments to the defendant. The monthly instalment payable by the plaintiff over a period of 36 months is RM13,888.90. The plaintiff took possession of the quarry in September 1992. A dispute arose between the parties. The defendant's complaint was that the plaintiff defaulted in payment of the rental and royalty as well as the instalments for the purchase of the machinery. The defendant by a notice, terminated the LA. The plaintiff filed these proceedings for specific performance of the LA and also obtained

interlocutory injunction against the defendant on 11 October 1994. There is also a counterclaim for reliefs and damages by the defendant. The authorities refused quarry licence to the plaintiff for causing damage to the neighbourhood in 1997 and the LA too has expired by effluxion of time. The question of specific performance is therefore no longer a live issue.

ISSUES FOR DETERMINATION OF THE COURT

From the pleading and the evidence adduced by both the plaintiff and the defendant, the principal issues to be determined by this court are as follows:

(i) whether the defendant committed breach of the terms of the LA as to (a) obtaining licence, permits, etc, (b) access road or (c) registering the lease;

(ii) whether the plaintiff committed breach of the essential terms of the LA as to (a) payment of rent and royalty and instalment payment for the machinery, (b) payment of quit rent (c) quarrying and removing rock materials without surveyor's report and (d) running the quarry in accordance with the Rules, etc.

The above issues, in my view, do overlap and only upon findings by the court one way or another, the question of relief will arise.

ANALYSIS OF EVIDENCE AND FINDINGS OF COURT

Before proceeding to analyze the evidence, I shall first deal with some of the relevants matters in this case for a better understanding of the issues before the court. The LA was prepared by the plaintiff's solicitors as seen in the evidence of the lawyer, A Xavier ('SD4') who confirmed this fact. So whatever ambiguity, if any, in the LA should be construed against the plaintiff by the contra proferentem rule (see *Ismail bin Mohamad v Haji Yahya & Ors* [1988] 2 MLJ 185). Under the National Land Code ('NLC'), lease of land should be for more than three years (see s 221 of the NLC). What a 'lease' is, is not defined. The common law definition of 'lease' as given in *Halsbury's Laws of England* (Vol 27(1)) at p 60, inter alia, is as follows:

> An instrument is usually construed as a lease if it contains words of present demise. Even where the instrument is called an 'agreement' and contains a stipulation for the subsequent granting of a formal lease, it may be construed as a lease if the essential terms are fixed, especially if possession is to be taken under it and if the covenants which would be inserted in the lease are to binding at once.

The distinguishing characteristic of a 'lease' is the grant of exclusive possession of the land to the tenant. 'Rent' is also not defined in the NLC. In common law, the nature of the 'rent' is defined as the recompense paid by the tenant to the landlord for exclusive possession of corporeal hereditaments (see p 202 of *Halsbury's Laws of England*, Vol 27(1)). There are two types of payments to be made by the plaintiff to the defendant under the LA. One is rental (rent) for exclusive possession of the lands and the

A other is 'royalty' for extraction of the rock materials from the defendant's quarry. 'Royalty' is not defined under the LA in this case. Royalty is 'a share of the product or profit from real property, reserved by the grantor of a mineral lease in exchange for the lessee's right to mine or drill on the land' (see definition in *Black's Law Dictionary*). I am of the view that it is important to bear in mind the distinction between 'rent' and 'royalty' as B each has its own legal incidents. The construction of the terms of the LA is a question of law. But whether the plaintiff or the defendant has committed breach of any of its terms is a mixed question of fact and law. With these preliminary observations, I shall now turn to the evidence adduced by both the plaintiff and the defendant.

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WHETHER THE DEFENDANT COMMITTED BREACH

(A) Alleged failure to obtain licences, permits, etc

D (I) MPT Licence

Every quarry operator within the Municipal area of Taiping is by law required to obtain a licence to operate. MPT is the local authority for Taiping responsible for issuing such licence. The licence is issued subject to conditions. One of such conditions is that such licence can always be E revoked by MPT without giving any reason (see the condition imposed by MPT in exh P7). The plaintiff's contention is that the defendant did not apply for the licence at all for the year 1993 onwards. Now, let us look at the evidence to see whether the contention is proved by evidence.

SD1, Ong Hean Hooi ('Ong'), was the man behind the defendant company. He was getting old and sick. That was the reason for granting the F lease to the plaintiff. This was admitted in evidence by the witness for the plaintiff, SP1, Loh Choon Ghee ('Patrick Loh'). SD1 Ong said in his testimony that because of his indifferent health, he was not able to go to the relevant departments but would sign any document prepared by the plaintiff for the purpose of application of any licence. The defendant G deposited a sufficient number of letterheads for use by the plaintiff for any application to be made including MPT's licence. SD1 Ong signed whenever he was asked to sign any form or application. Pursuant to this arrangement, he signed the application on behalf of the defendant company at the request of the plaintiff. For the year 1993, the application for licence was typed by the plaintiff on the letterhead provided by the defendant and H SD1 Ong signed the application. The application was dated 2 December 1992, almost a month before the expiry of the MPT's licence for 1992. This fact was admitted in the evidence of a witness called for the plaintiff who is the manager of the plaintiff company at the quarry site by the name of Jagroop Singh ('SP2'). When MPT imposed conditions as to the access road, again the plaintiff prepared an appeal letter to MPT which was signed I by SD1 without any demur or delay (this appeal letter was produced as exh P13). Based on the above mentioned evidence, I find no proof that the defendant did not co-operate in applying for the said license from the MPT.

For the year 1994 and for subsequent years, SP2, for the plaintiff, took it upon himself to sign the application. This can be seen in SP2's evidence whereby he had, amongst others, stated inter alia, as follows:

> To the best of my knowledge, all the applications for the various licences or permits were made by me on behalf of the defendant company. I signed the application form as the manager of the defendant company. All these applications were accepted by the relevant departments without queries. For the year 1995, I also applied these licences or permits on behalf of the defendant company and also for the year 1996. The position in 1997 is also the same.

SP2, in his evidence also admitted using the letterheads given by the defendant and when he ran out of the stock, he used photostat copies of the letterheads. He also sent his clerk to collect an adequate amount of letterheads for his use. Again, SP2 admitted signing these applications in his capacity as the manager of the quarry and by virtue of the Perak Quarry Rules. He also said that he acted with the consent of SP1 Patrick Loh. SP1 Patrick Loh, when faced with this evidence of SP2 Jagroop Singh, had to agree whereby in his (SP1) evidence he had stated as follows:

> I instructed my manager at the quarry, Mr Jagroop Singh, to make the application on our behalf. The chop of the defendant company as printed on these forms must have been obtained from the defendant company.

SP4 the Municipal Health Officer, Dr Talib bin Abdul Majid, called by the plaintiff, in his evidence confirmed that it was SP2 Jagroop Singh who was dealing with MPT in respect of all applications for MPT's licence. SP4 could not recall ever dealing with SD1 Ong except there was application for renewal of MPT's licence for the year 1993. The fact that there was an appeal against the condition imposed by MPT and this appeal letter (exh P13) was again signed by SD1 Ong at the request of the plaintiff is clear proof that the defendant was co-operative.

In the circumstances of the case, it is my finding that there is no evidence to establish that the defendant ever refused to sign the application for renewal of MPT's licence for the year 1993 or after.

(II) Permit for the removal of rock materials (borang C) and permit for use of explosives

This relates to an application under the NLC for removal of the rock materials from the quarry. Again, I find from the evidence adduced, the same procedure for the application to obtain MPT's licences applied for the application of permit for the removal of rock materials and permit for the use of explosives at the quarry site. SP2 Jagroop Singh admitted in evidence that for the year 1993, the application was signed by SD1 Ong. He had admitted sending his clerk to get the form signed. This document was produced as exh D86. SP2 has further admitted that he applied for all the licences and permits on behalf of the defendant company. We have to bear in mind that particulars such as the amount of rock materials to be removed have to be inserted in borang C. These particulars could only be provided

by the plaintiff company. For example, let us look at exhs P90A and B which are forms of application for removal of rock materials (borang C) made on 8 August 1997. The application is for removal of 150,000 metric tons of rock materials. Look at para B in the application. Particulars given therein belong to SD1 Ong, but the application was signed by SP2 Jagroop Singh.

The official address given in the form is also wrong. Lot 1039, Jalan Saw Ah Choy is not the registered address or head office of the defendant company. The defendant has alleged that the chop of the defendant used in p 2 of exh P90A is a false chop. It is a criminal offence to make chop of the defendant company without its authority or resolution. SD1 Ong gave unchallenged evidence that the chop used by the defendant company carries Chinese characters which is missing from the one used by Jagroop Singh on P90A and B. The chop authorized to be used by the defendant company was produced in court as exh D98. No explanation was forthcoming from the plaintiff on this point of allegation made by the defendant. SP5 plaintiff's clerk has admitted that all applications for borang C were prepared and signed by SP2 and submitted direct to the Land Office.

As to the permits for explosives and magazine licence, I find that what has been said about borang C would apply. As regards permit for the year 1993, the application was made on 2 December 1992 and signed by one of the directors of the defendant company, Ong Chew Chai. This application was produced as exh P72. For the year 1994, the application was made by SP2 Jagroop Singh on 17 November 1993 on the letterhead provided by the defendant company. This application was produced in court as exh P73. As has been stated earlier, SP2 has admitted that he made all the applications for the subsequent years on the letterheads provided by the defendant company. In the circumstances, it is my finding that there is no basis for the allegation that the defendant company defaulted in co-operating with the plaintiff in obtaining the necessary permits for explosives and magazine licences. The plaintiff is also estopped from contending that the defendant must sign the application as the plaintiff had, as a matter of course, used the letterheads furnished by the company and by submitting the application on behalf of the defendant.

(III) Permit under the Perak Quarry Rules 1992 ('The Rules')

When the LA was entered into, these Rules were not in force. The defendant had the right to carry on quarry operations until the end of 1992. This was confirmed by SD1 Ong. He said when he received the notification (exh P48) from the Mines Department, he gave it to SP1 Patrick Loh as the meeting at the Mines Department was scheduled to be held on 21 September 1992 and by then the plaintiff would have taken possession of the quarry.

He attended the briefing with SP1 Patrick Loh. Patrick Loh himself admitted in evidence that for the year 1992, no licence was required by the Mines Department. It is also noted that the plaintiff had engaged Osborne & Chappel to prepare a quarry scheme report (exh P55). It is reasonable to

infer that the plaintiff asked for this report on its own accord without the knowledge of the defendant because there was no request made to the defendant for this purpose. In any event, the plaintiff on its own had gone on to obtain the permits from the Mines Department using the letterheads provided by the defendant and signing on its behalf. One of the permits issued by the Mines Department under the Perak Quarry Rules 1992 was produced as exh P30 which refers to the quarry scheme report from Osborne & Chappel dated 1 February 1993. The plaintiff's witness, SP6, Azman bin Abdul Majid, who is a penolong pengarah galian confirmed that he dealt with SP1 and SP2 relating to the issue of permits under the Perak Quarry Rules. He also confirmed that SP2 Jagroop Singh was the manager of the quarry from 1992 to 1997. I therefore find that there was no evidence of any breach on the part of the defendant in respect of the requirement to apply for a permit under the said Rules.

(IV) Environmental report

It is alleged that the defendant was responsible for obtaining this environmental report. The defendant was operating the quarry from 1968 to 1992. There was no requirement that the environmental report should be obtained during this period of 22 years. I am of the view that the question of environmental report arose only in 1995 because of the complaint from the residents in the vicinity who felt the effect of the blasting done by the plaintiff. This is stated by SP4 Dr Talib in his evidence as follows:

> In the year 1995, there was a delay in the approval of the MPT licence to Thye Sun Quarry Sdn Bhd because there was a complaint from the residents around the quarry site. The residents of the said area complained about the noise because of the rock blastings and small stones flying around. There was also a complaint from the residents in the year 1997.

By then, this action had already been filed and there is no evidence that the defendant was ever approached for such environmental report. In any event, it was the plaintiff who was responsible for the reckless blasting and causing nuisance and endangering the health and safety of the residents in the neighbourhood. Hence, it cannot be attributable to the defendant for failure to obtain the said environmental report.

(B) Access road

The allegation of the plaintiff is that the defendant failed to provide an access road to the quarry and thus committed breach of the LA. To determine this issue, we need to go back to the time when the defendant started operating the quarry in the late 60's. At that time, the quarry was in the name of SD1 Ong. He later transferred the quarry to the defendant company.

The access road was through a piece of Government land which was in the possession of SD1 by way of TOL (exh P15). The right to use the TOL as access road to the quarry was given by the Land Office on the application by SD1 Ong (see exh P14). The TOL was annually renewed until the end

of 31 December 1988. After that, the Land Office refused to renew the TOL. There was no interference by the Government for use of the access road even though the TOL was not renewed after 1988. The defendant had been using the access road at the time the LA was entered into with the plaintiff. The defendant claimed that the copy of the expired TOL (P15) and (P14) the accompanying letter by the land officer were shown to SP1 Patrick Loh. This was at the time of negotiations leading to the execution of the LA. The lawyer acting for the defendant, then Mr A Xavier ('SD4'), testified that he sent a copy of the TOL (P15) to the plaintiff's solicitors. Even SP1 Patrick Loh has admitted that he was shown a copy of the TOL (P15) by SD1 Ong.

I am of the view that the plaintiff must have knowledge of the availability of the access road even at the time of negotiations. A reference to exh P13, the letter prepared by the plaintiff as an appeal to the MPT, was signed by SD1 Ong at the request of the plaintiff. The contents must have come from the knowledge of SPI Patrick Loh. Inspite of the solicitors for the plaintiff and SP1 having been in possession of a copy of the TOL, there occurred an error in the drafting of exh P6. In Recital No 2 of the LA where the reference is made to the TOL (P15), it is stated that the TOL was held by the defendant. As stated earlier, the TOL was issued to SD1 Ong and had in fact expired on 31 December 1988 which is almost four years before the execution of P6. Therefore, there is a mutual mistake by both parties with regard to the TOL being in the name of SD1 Ong as in exh P6. The lawyer who drafted exh P6, Mr Xavier ('SD4') himself acknowledged this mistake.

As the mistake is so obvious, nothing turns on it. There was no TOL either in the name of SD1 Ong or in the name of the defendant, but it was a fact that there was no objection by the Government for the use of the land comprised in the former TOL as access to the quarry, and it was known to the plaintiff.

I am of the view that what SD1 Ong represented at the time the LA was entered into was factually correct in that the access road was available and that there was no reason to the contrary. To find out the legal incidents of a TOL, we have to look at the provisions of the National Land Code (see Ch 2 of Division II (ss 65–69)). A TOL is a temporary occupation licence subject to renewal by the Government for a limited period of time. A licence by its nature is revocable. But there was a reasonable expectation for SD1 Ong to believe that the access road would continue to be available.

The plaintiff relies on cl 4.9 of the LA to show that there was an obligation on the part of the defendant to ensure that the access road was available at all times. However, as stated earlier, there was a mutual mistake on the part of both parties that there was a valid TOL in the name of the defendant. A mutual mistake invalidates the agreement and makes it void — (see s 21 of the Contracts Act 1950). No one could have promised that the access road would continue to be available once the Government has not renewed the TOL. SP1 Patrick, for the plaintiff, is not an ordinary man. He is an engineer by profession. He had said in his evidence, amongst

others, that his family has been involved in quarry business for some time and he has considerable experience himself on this quarry business. I am of the view that SP1 Patrick Loh knew or he ought to have known from his experience that TOL is revocable and that no one can guarantee that the access road (which was on the TOL land) would continue to be available forever. SP1 was advised by his own solicitors. It is not possible that any lawyer worth his salt would have felt any comfort in the assurance, if any, on the part of the defendant to guarantee the availability of the access road as stated in cl 4.9. In any event, the lawyer who was handling the preparation of the LA on behalf of the plaintiff was not called to give evidence whether he or she felt any comfort in accepting such assurance. Any such assurance would be an impossibility in law as s 57(1) and (2) of the Contracts Act read as follows:

> (1) An agreement to do an act impossible in itself is void.
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

I am of the view that there was a basis for representing that the access road was available at the time of execution of the LA because though the TOL was not renewed after 1988, there was no action on the part of the MPT or the Land Office to stop the use of the access road by the quarry. If the use of the existing access road was not allowed by MPT, then cl 4.9 became void as it was impossible for the defendant to do anything to change the mind of MPT or any authority for the matter. But the plaintiff has chosen to adopt the LA. So it is estopped from relying on the mistake found in the LA.

On the evidence adduced, I find that MPT never denied any access. What MPT wanted was that the alternative route should be used by broadening it. This is found in condition 6 in Lampiran A annexed to exh P7. The plaintiff found this alternative route inconvenient and hence it made the appeal (see exh P13) to MPT for reconsideration. This appeal was drafted by the plaintiff and the reasons are given in para 1. It was simply a matter of convenience for the plaintiff. Therefore, it is wrong to say that there was no access road available. MPT, as can be seen from P7, provided an alternative access but the plaintiff was not prepared to accept it because it involved exhumation of some graves and that it was more costly.

I am of the view that in the circumstances of the case, the plaintiff has not proved any breach on the part of the defendant in providing the access road to the quarry. Even if there was any breach, I find that it has been waived by the plaintiff's act in appealing to the MPT through the defendant for a reconsideration of MPT's decision in imposing conditions as regards to the existing access road. In relation to the access road, it could be said that the plaintiff wanted a more convenient route. It is common knowledge that Chinese are extremely superstitious about passage through a graveyard as they consider it most inauspicious. That was why the plaintiff purchased vacant lots from the developer to build a new road which they considered

more convenient and would possibly bring luck. It must be stated here that MPT's licence has always been issued subject to conditions, and if MPT required as a condition an alternative route in place of the existing access road, the plaintiff cannot blame the defendant for it. MPT as a statutory authority was entitled to take into consideration the interest of the public and the movement of the heavy vehicles along the existing access road and discontinue the use of it.

There is overwhelming evidence both oral and documentary which shows that it was the plaintiff who has committed breach of the essential terms of the LA. I am of the view that in any construction of any contract, the reasonableness of the result of such construction is the predominant consideration. The epitome of this approach is to be found in the following observations of Lord Diplock in the case of *Antaios Compania Naviera SA v Solen Rederierna AB* [1985] AC 191 wherein at p 201 his Lordship had this to say:

> I agree with the passage I have cited from the arbitrator's award and I take this opportunity of restating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

I am of the view that it is reasonable to read the LA in such a way that the access road would be only available as long as it was allowed by the authorities. When construing cl 4.9 of exh P6 the following observation of Megarry VC in the case of *Tito v Wadell (No 2)* [1977] 2 WLR 496 should be borne in mind, wherein his Lordship stated as follows:

> I think that such phrases have to be construed in a reasonable sense when they are contained in business transactions intended to have legal effect. Today there are many things which can be achieved, but only with a vast expenditure of time and effort and money. Because they can be achieved in this way, they are literally 'possible'; but in a business document intended to have practical effect, the parties are unlikely to have contemplated an obligation to do something which is altogether outside the range of the practicable and reasonable merely because they use the word 'possible'.

(C) Registration of the lease

It is alleged that the defendant did not attempt to register the lease in the name of the plaintiff. It is my finding that the defendant was ready and willing to give the issue documents of title to the plaintiff for registration, provided the plaintiff complied with the terms and conditions of the LA. This is evidenced by the letter written by the defendant's lawyer which was produced in court as exh P42. The charge on the land had been discharged. But by then, dispute had already arisen as to the payment of rent for the month of December 1992 and onwards. The plaintiff was violating the essential terms of the LA relating to payment of rent, royalty and instalments and these breaches have not been remedied by the plaintiff until today. In my view, this was the reason why the lease was not registered. On this point, it is appropriate to refer to the provision of s 52 of the Contracts Act 1950 which states as follows:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

I therefore find that the defendant was not liable to have the lease registered in the name of the plaintiff when the plaintiff was blatantly violating the essential terms of the LA as to the payment of the rent, royalty and instalments. The plaintiff has not made good by evidence any of the allegations made in the statement of claim. There are so many incontrovertible and contemporary documents on which this court can safely reach such a conclusion. Having seen in the witness box SD1 Ong giving evidence and inspite of his age, I find that he was hardly shaken in cross examination because he was telling the truth.

Whether the plaintiff has violated the essential terms of the lease agreement (LA)

The plaintiff's claim as reamended is still for specific performance of the LA. To obtain specific performance, which is an equitable relief, the law requires proof that the plaintiff has performed the essential terms of the LA. This legal requirement finds expression in s 23(b) of the Specific Relief Act which reads as follows:

> Specific performance of a contract cannot he enforced in favour of a person —
>
> (b) who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed;

With this in mind, I shall turn to the evidence to ascertain whether the plaintiff had violated the essential terms of the LA.

(I) Failure to pay the rent as and when due

Time is of the essence under the LA — (see cl 12 in exh P6). There is a covenant on the part of the plaintiff to pay rent under cl 2.3 para (a) of the LA. As stated earlier, the rent is the periodical consideration for exclusive use of the lease land and infrastructure. In this case, the rent was payable monthly. SP1 Patrick Loh has admitted in evidence that he took possession of the quarry soon after the execution of the LA. The plaintiff paid rental for the months of September, October and November 1992 but did not pay rent for December 1992 and onwards. Here the problem started. There were several demands by the defendant for rent and other payments (royalty and instalments for purchase of machinery) due under the LA. The defendant served through his lawyers a notice (exh P39) but there was no response. Another notice (exh P43) was served. Yet, no payment was forthcoming. The contention of the plaintiff was that there was no licence issued by MPT for the year 1993 and therefore no rent was payable.

The plaintiff contended that though it was in occupation of the demised land and having the use of the land and the infrastructure facilities, yet it was not liable to pay rent because there was no licence issued by MPT for the year 1993. SP1's evidence on this aspect of the case is that he insisted

there must be a full quarry operation before rent is payable. By 'full quarry operation' he maintained that before the plaintiff became liable to pay there must be 'extracting, blasting, loading, hauling, crushing, stockpiling, transportation, marketing and selling of the rock materials'. He maintained that the plaintiff must be in a position to perform all these functions before the defendant was entitled to receive any rent. I am of the view that the plaintiff's contention is not tenable for the following reasons:

(1) clause 2.3(a) of exh P6 does not attach any condition to payment of rent which, as found earlier, is for use and occupation of the demised land and the infrastructure facilities;

(2) the plaintiff can only discontinue paying rental under cl 2.3(c) if it was unable to continue with the quarry operation. At no time was the plaintiff unable to continue with the quarry operation. Work was going on in the quarry all the time. One or several components of quarry operations were earnestly being carried on with a view to produce rock materials. There was erection of the quarry and commissioning of the plant between September and December 1992. There is evidence that workmen employed by the plaintiff were continuously working on the quarry. There was blasting. There was removal of over burden. The crusher was working. There was continuous business activity as can be seen from the Tenaga Nasional bills produced as exh P35. Average consumption of electricity from 30 September 1992 until 30 March 1993 came to RM1,200 every month. This is very cogent evidence that different aspects of quarry operations were being carried on incessantly though the MPT permit was issued only on 4 March 1993. Since taking over the quarry in the middle of September 1992, the quarry was in the exclusive occupation of the plaintiff and their workmen. There is no denial that the infrastructure facilities were being used. The site office of the quarry was fully functioning;

(3) the rent is payable as long as the plaintiff was having the exclusive use and occupation of the demised land. It was never 'unable to continue the quarry operation'. There may have been delay in obtaining the necessary permits but that does not mean that it was unable to continue the quarry operation. The functions which fall under the definition of quarry operations must be construed disjunctively. Otherwise it will lead to unreasonable construction. I shall now demonstrate how unreasonable such construction is and would possibly cause injustice. Assume for a moment that the plaintiff, with a view to frustrating the defendant, refuses to market or sell the rock materials or stockpiles and the crushed rocks in anticipation of increase in price in the market. Can it in such a situation refuse to pay rent on the ground that there is no full quarry operation? Will the law allow such unreasonable conduct on the part of the plaintiff? Certainly not. The commercial contracts must be construed to produce reasonable results as referred to in the dictum of Lord Diplock in *The Antaios Compania Naviera* earlier cited;

(4) in the construction of any contract, how the parties conducted themselves in relation to its terms is decisive as to how it should be interpreted. Here, it is plain that plaintiff itself has conducted itself in such a manner that the rent was payable whether or not the quarry was in operation.

It is not disputed in evidence that the plaintiff did tender rent for the months of September to November 1992, though there was no quarry operation. So the question is: why pay the rent if the quarry was not fully operational? The inference in my view is that there is no basis for the contention that the rent is not payable unless the quarry was in full operation. The plaintiff is estopped by virtue of the principles applied by the Court of Appeal in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 wherein the Court of Appeal at p 345 had this to say:

> It may operate to bind the parties as to the meaning or legal effect of a document or clause in a contract which they have settled upon (see *Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v Calgary Milling Co Ltd* (1919) 48 DLR 295; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897.

By paying rent for the month of September, October and November 1992 when the quarry was not operating, I take the view that the plaintiff did represent that the rent was payable whether or not the quarry was in full operation. It is therefore estopped from saying that the LA should be construed differently. It cannot blow hot and cold as it suits the plaintiff.

(II) Failure to pay royalty

As stated earlier, royalty is in layman's terms compensation payable to the lessor for the rock materials or minerals extracted from the demised land by the lessee. Clause 2 in exh P6 makes elaborate provisions for determination of the royalty and how it should be calculated. The rate is RM2 per cubic yard solid. The first royalty payment should commence after four months from the date of signing of exh P6 (see cl 2.3 para (d)). Payment of the royalty does not depend on the sale of the rock materials. It arises from the time the quantity of reserves is assessed by the surveyor (see para 2.1(a) and (b)). This survey report must be made available within three months from the date of execution of exh P6. The royalty is not a fixed sum but depends on the quantity extracted.

I find that the way the plaintiff dealt with the payment of royalty is questionable. The payment was tendered far beyond the period fixed by the LA in a whimsical fashion. The alleged surveyor's report did not even quantify the rock reserve (see exh P46 (p 2)). The plaintiff did not even bother to get a proper surveyor's report as required. No records of extraction of rocks which would conclusively prove to the court the amount of rock materials extracted were produced. It is my finding that there was clear breach on the part of the plaintiff in complying with this covenant in the LA.

(III) Failure to make instalment payments of purchase of plant and machinery under first schedule to exh P6

This sale by the defendant to the plaintiff under the LA was an outright sale by which property in the plants and machinery passed to the plaintiff. SP1, for the plaintiff, admitted that there remains a balance of RM250,000 still due and payable to the defendant in respect of the purchase of plant and machinery. SP1 however, had the audacity to tell the court that after using the plant and machinery for almost seven years and having removed the crusher from the plant, and in spite of the fact that the property in the plant and machinery had passed to the plaintiff by virtue of the sale, the plaintiff wanted to rescind the purchase. It is pertinent to note what SP1 said under cross examination as follows:

> Q: I put it to you that you have removed part of the machineries used from the quarry site.
>
> A: It is only for item (b) as in the first schedule to the lease agreement.

Item (b) in the first schedule to the LA is the crusher worth RM300,000. There is also an admission by the plaintiff that the removal of the crusher was without the knowledge of the defendant. It is clear that there cannot arise any question of rescission of the sale of the machineries. It is too late in the day for the plaintiff to ask for rescission. It is highly inequitable.

Property in the plant and machinery in the first schedule of the LA had already passed by virtue of the sale and is consistent with the provision of s 20 of the Sale of Goods Act 1957. The effect of contract of the outright sale was to vest the title of the goods in the plaintiff. The defendant cannot be restored to its rights and would suffer great injustice. In the circumstances of this case, there cannot therefore be any doubt that the plaintiff was in breach of the essential terms of the LA with regard to making instalment payments of purchase of plant and machinery under the LA.

(IV) Failure to obtain the necessary surveyor's reports

Extraction of rock materials is a wasting process of the demised land. Once the rocks are removed by extraction, the rock reserves are depleted and the land virtually becomes a desert. As the extraction of the rock materials was completely under the control of the plaintiff, who has exclusive possession of the demised land, there is an obligation on the part of the plaintiff to obtain the surveyor's reports as to the quantity of rock reserves. This condition is to be found in cl 2 exh P6. This condition is an essential term because ultimately the royalty payable to the defendant has to be calculated on the basis of the surveyor's report. The plaintiff was only entitled to quarry at the place coloured red in the plan annexed to exh P6 with an option to quarry on the place coloured green in the plan under the LA. The plaintiff must obtain the report in respect of the area marked red within three months from the execution of the LA. If the plaintiff intended to quarry in the area marked green, it must get a surveyor's report before the option is exercised. It is my finding that the plaintiff defaulted in complying with these two essential conditions.

In respect of its obligation to provide the first report, the plaintiff only produced a plan of topographical details and control survey which did not in any way give the quantity of the rock materials as contemplated under the LA. In respect of its obligation to provide the second report, this report was never obtained at all nor was it produced in court though it was admitted by SP1 and SP2 that massive quarrying has been done on the area marked green. The defendant had produced, through its witnesses SD2 Wong Ah Chai and SD3 Wong Yew Kin, the surveyor, that massive blasting and extraction of rock materials have been carried out on the area marked red as well as on the area marked green. The reports prepared by the defendant surveyors have been produced in court as exhs D96 and D97. It is my view that there cannot be any doubt that massive amount of rock materials have been removed from the defendant's land without compliance with the conditions stipulated in the LA.

(V) Breach of the covenant as to nuisance, etc

In view of the scope of the operation by the plaintiff, things went wrong. The vibration and the debris flying from the quarry operation became so intensive that the residents in the vicinity started complaining to MPT which had to suspend the licence for a certain duration in 1995 and ordered cessation of the quarry operation towards the end of 1997. The result is that the plaintiff has conveniently carted off whatever was remaining in the quarry to its other quarries either in Perak or in Kulim to which it has shifted. But the defendant has lost its right to operate the quarry anymore. With gaping craters on the demised land, nothing can be done. The plaintiff has not even settled the rental, royalty and the instalment payments. Under cll 5.8, 5.9 and 5.11 of the LA, the plaintiff was under an obligation to operate the quarry in compliance with all the Rules and not to cause any nuisance or disturbance, etc.

The complaints from the public started only when the plaintiff was operating the quarry. There is the letter from Land Office dated 22 November 1994 (exh P27) requiring the quarry to stop blasting. The letter goes on to say that the damage to the houses was serious. So it is clear that the disruption caused by the suspension was not due to the defendant but to the indiscriminate and massive blasting carried out by the plaintiff. The plaintiff's own witness, the municipal health officer (SP4) in charge of licensing, had this to say in evidence:

> Before year 1992, there was no difficulty in the application and approval of the MPT licence made by Thye Sun Quarry Sdn Bhd.

But he went on to say:

> In the year 1995, there was a delay in the approval of the MPT licence to Thye Sun Quarry Sdn Bhd because there was a complaint from the residents around the quarry site. The residents of the said area complained about the noise because of the rock blastings and small stones flying around. There was also a complaint from the residents in the year 1997. I did not know that the quarry came to stop on 30 September 1997.

I am of the view that no responsible authority such as MPT would permit operation of the quarry if the noise caused by blasting was so intense that it shook the neighbouring houses and when small stones were flying around endangering the safety and health of the residents. Therefore the MPT or the Land Office acted reasonably in closing down the quarry but who was responsible? I find that it was the plaintiff since the plaintiff was plainly in breach of the conditions imposed by MPT and the authorities. No responsible local authority or Land Office would have closed down the quarry unless there was an investigation and the investigation revealed that the blasting was the cause of disturbance and nuisance caused to the residents. There is overwhelming proof that the plaintiff has acted irresponsibly and in its own self interest without regard to the terms and conditions of the LA. The consequences are irreparable to the defendant. It has lost its right to quarry in the land forever.

(VI) Non-payment of quit rent

It is the obligation of the plaintiff to pay quit rent on the demised land (see cl 5.4 of exh P6). SP1 admitted that the plaintiff did not pay quit rent for the year 1993 to 1995. Failure to pay the quit rent exposes the landlord to forfeiture of the land (see ss 93, 94 and 95 of the National Land Code). The National Land Code ('NLC') does not require any notice to be served on the owner or lessee before quit rent is paid. Liability to pay quit rent arises by virtue of the provisions of the NLC. The reason given by SP1 that he was not in possession of the notice to pay the quit rent is unconvincing. There is no provision in exh P6 requiring service of the notice on the plaintiff for payment of the quit rent by the defendant. SP1 is an experienced man in business and he knows that quit rent should be paid. Non-payment would expose the defendant to forfeiture pursuant to the provisions of the NLC. SD1 Ong in his evidence produced the quit rent receipts (exh D95). Breach by the plaintiff is a violation of an essential term of exh P6. The defendant has the right to expect the plaintiff to settle the quit rent because any default by operation of the provisions of the NLC would expose the defendant to lose the land by forfeiture by the state authority.

DECISION OF THE COURT

It is my finding that the breaches dealt with under items (i) to (vi) above are of so fundamental importance that the defendant is entitled to treat itself being discharged from the obligation under the LA. Hence, the notice of termination ('P37') given by the defendant was a valid notice and puts an end to the LA, as this notice was given pursuant to cl 10 of exh P6. In support of this proposition, I would like to rely on the principles enunciated in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 wherein his Lordship Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal, at p 680, had this to say:

> Now, in every contract be it for the sale of land or any other commodity, there are generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the

purpose of determining the kind of remedy that is to be made available to an innocent party, ie the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it.

Having analyzed the evidence adduced by both parties, it is my finding that the defendant has succeeded in proving that it was the plaintiff who has violated the essential terms of the LA and is therefore entitled to succeed in its counterclaim. Before dealing with the defendant's counterclaim, it is necessary that this court address itself again to the interlocutory application earlier made by both parties in the course of the proceedings of this case. Soon, after filing this action, the plaintiff made an ex parte application to the court and obtained an interlocutory injunction on 11 October 1994. As can be seen from the injunction obtained, it is very extensive in operation. The defendant or its agents were prevented from even entering the quarry. The fact that this court has found now that the plaintiff has failed to prove its claim, then the injunction should be discharged and there must be an order for an inquiry as to the damages. With regard to the interlocutory application made by the defendant, the order given by this court on 29 February 1996 in favour of the defendant requiring the plaintiff to pay the rent, royalty and instalments has not been complied with by the plaintiff. The conduct of the plaintiff must be taken into consideration. Defiance of the court order dated 29 February 1996 is certainly a matter of serious consideration. It is a maxim of the Court of Equity that 'He who seeks equity must do equity'. The chancellor also always insisted that 'he who comes to equity must come with clean hands'. If the plaintiff has breached the essential terms of the LA and has treated the court order dated 29 February 1996 with contempt in my view, it has forfeited its right to any equitable relief.

COURT OF APPEAL ORDER DATED 26 OCTOBER 1998

This court on 21 April 1998, on an application made by the plaintiff, directed the defendant to sign the application form borang C. There was an appeal and the defendant requested the plaintiff's consent for a stay which was not forthcoming. The hearing of the appeal was expedited and the Court of Appeal on 26 October 1998 varied the order of this court by requiring the plaintiff to pay the proceeds of the sale of the rock materials into an account to be held in the name of the solicitors for the plaintiff and defendant pending the disposal of the suit. The defendant was ready and willing to execute the necessary forms but the plaintiff was not helpful. There was an insinuation in the course of evidence that the defendant blocked the plaintiff's application to the Land Office to obtain borang C. I find that this insinuation is unjustifiable. What happened was that the plaintiff submitted the application form (exh P90) without the knowledge of the defendant. This application form was signed by SP2 on behalf of the defendant using a false chop and purportedly as an officer of the defendant company. The application came to be rejected because form 49 under the Companies Act did not show that SP2 Jagroop Singh was ever appointed an officer or director of the defendant company. In any event, the defendant

was entitled to object to the issue of borang C as SP2 has misrepresented his position and that the plaintiff was in breach of the court's order given on 29 February 1996.

In the circumstances of the case, it is my decision that the plaintiff's claim be dismissed with costs and the interlocutory injunctions given on 11 October 1994 and the order made on 21 April 1998 be discharged with an order for inquiry before the deputy registrar of this court as to damages.

COUNTERCLAIM

For the reliefs prayed in the defendant's counterclaim, I hereby grant the following orders:

As for prayer (a) which is for vacant possession of the said lands, I made an order in terms.

As for prayer (b) the defendant is entitled to all the equipment, plant and fixtures as stated in the second schedule of the LA (other than the plant and machinery sold to the plaintiff under the first schedule). I accordingly grant an order in terms.

As for prayer (c) which is a claim for the balance of the purchase price for the plant and machinery for the sum of RM263,888.70, this is the amount due and payable to the defendant by the plaintiff for the plant and machinery sold to the plaintiff under first schedule to exh P6. Judgment is therefore given for this sum.

As for prayer (d) which is claim for damages for all the arrears of rental payable by the plaintiff under the LA and also for royalty, the deputy registrar be directed to hold an inquiry as to determine the amount.

As for prayer (e) it is a consequential order to prevent the plaintiff or its servants and agents from entering into the quarry. Plaintiff has no more right to enter the quarry as the term has come to an end or by its stopping operation of the quarry in 1997. I accordingly grant an order in terms.

As to the interlocutory injunction given on 11 October 1994 which has to be discharged if the plaintiff has not established its legal right to it, then it will automatically follow that the defendant is entitled to damages as may be determined by the deputy registrar. I hereby grant an order in terms accordingly. Finally, I make an order than the defendant's counterclaim is allowed with costs.

Claim dismissed with costs and counterclaim allowed with costs.

Reported by D Sivalingam